

UNITED STATES

MANNING, Bradley E., PFC

U.S. Army, (b) (6)

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

DEFENSE REQUESTED

**WITNESSES: SPEEDY TRIAL
MOTION**

DATED: 24 August 2012

a) COL Carl Coffman, United States Forces-Afghanistan (b) (6). As the former Special Court-Martial Convening Authority (SPCMCA), COL Coffman was the approval authority for numerous Government requests for excludable delay under Rule for Courts-Martial (RCM) 707(c). COL Coffman will testify concerning his approvals of the Government's requests for excludable delay. For any particular period for which excludable delay was found, COL Coffman will testify regarding the grounds which the Government provided for its request. COL Coffman will also testify regarding how the Government made its request for excludable delay, and his decision process in electing to grant the Government's exclusion request (often over the Defense's opposition and demand for speedy trial). COL Coffman will testify that he approved separate requests for excludable delay covering a period from 12 July 2010 until 16 November 2011 (493 days of excludable delay).

b) SFC Monica Carlile, United States Army Legal Services Agency (USALSA), (b) (6). SFC Carlile will testify regarding the circumstances of her signing for COL Coffman on the 22 April 2011 Excludable Delay Memorandum. At the time she signed for COL Coffman, she was a paralegal for the Office of the Staff Judge Advocate, Military District of Washington and worked under the supervision of the Trial Counsel. SFC Carlile will explain the role she played in that Government request for exclusion of 36 days of apparent inactivity between 18 March 2011 and 22 April 2011. She will also testify regarding her involvement in the processing of previous and subsequent requests for excludable delays to COL Coffman.

c) LTC Paul Almanza, (b) (6). LTC Almanza was the Article 32 Investigating Officer. He will testify regarding his decision to exclude two weeks of "federal holidays and weekends" between 23 December 2011 and 3 January 2012. During this time LTC Almanza chose not to work on the case. In response to a request from MAJ Fein, LTC Almanza elected to exclude these days. LTC Almanza will testify regarding his believed legal basis for such a decision.

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- d) Dr. Michael Sweda, Chief, Forensic Psychology Service, (b) (6) [REDACTED] Dr. Sweda was in charge of the RCM 706. Dr. Sweda will testify regarding the basis or bases for the RCM 706 Board's requested delay from 3 March 2011 until the date he submitted the Board's report on 22 April 2011.
- e) Original Classification Authorities (OCAs). The various OCAs conducted reviews of the charged classified information in this case. The SPCMCA approved numerous requests for excludable delay by the Government apparently to provide the Government with time to obtain classification reviews from the various OCAs. Even the Article 32 Investigation was delayed for over eight months in order to obtain the OCA Disclosure Requests and the OCA Classification Reviews. The various OCAs will testify regarding the following: i) when the Government first contacted the specific OCA; ii) when the Government first requested the OCA to conduct a classification review; iii) the amount of times the trial counsel followed up with the OCA to determine the progression of the OCA's review; and iv) when the Government first requested the OCA to consent to disclose the classified evidence to the Defense. Each OCA will also explain the process of complying with the Government's request. The OCA will testify about: i) how long it took to complete the classification review and why; ii) how many people from its organization worked on the Government's request; and iii) the basis for any delay between completion of the classification review and the OCA giving consent to the Government to disclose the information. The Defense requests at least one witness with knowledge of the classification review process in this case from each OCA. The Defense requests the Government produce a witness from each of the following OCAs:
1. United States Central Command (CENTCOM);
 2. Joint Task Force – Guantanamo (JTF-GTMO);
 3. Department of State (DOS);
 4. Office of the Director of National Intelligence (ODNI);
 5. Other Government Agency for Specifications 3 and 15 of Charge II;
 6. Defense Information Systems Agency (DISA); and
 7. United States Cyber Command (CYBERCOM).
- f) Government's Due Diligence in Regards to RCM 701(a)(2) and RCM 701(a)(6)/Brady. The Defense requests a witness from each of the following organizations:
1. Headquarters Department of the Army (HQDA). On 29 July 2011, the Trial Counsel sent a request to Headquarters, Department of the Army to task Principal Officials to search for, and preserve, any discoverable information. The Defense requests a witness with knowledge from HQDA that can explain why no action was taken by HQDA for nine months after receiving the Trial Counsel's request. The witness will also testify regarding whether the Trial Counsel attempted to follow up on the 29 July 2011 memorandum at any time during the nine months of inactivity. Finally, the witness will testify about the time it took to comply with the 29 July 2011 request.

2. Department of State (DOS) and Diplomatic Security Services (DSS). On 30 May 2012, during an 802 conference, the Government admitted that they had not reviewed anything at the Department of State except for the DOS damage assessment. *See* Appellate Exhibit 99, p. 2. At the point of the Government's admission, the case had been ongoing for over two years. Despite this passage of time, the Government still had not conducted any DOS search for RCM 701(a)(6)/*Brady* material. The Defense requests a witness with knowledge from the DOS that can explain when the Government first contacted the DOS to conduct an RCM 701(a)(6)/*Brady* search. The Defense also requests that this witness, or another witness, be a person with knowledge regarding the Government's RCM 701(a)(2) search of the DOS files. Finally, the Defense requests that a witness be provided from Diplomatic Security Services (DSS) to testify to when the Government first contacted the DSS to conduct an RCM 701(a)(6)/*Brady* search and when the Government actually conducted this search.
3. Federal Bureau of Investigation (FBI). The Government first revealed on 31 May 2012 that the FBI had completed an impact statement. *See* Appellate Exhibit 100, p. 4. The Defense requests a witness to be produced from the FBI that can speak to when the impact statement was prepared. This witness should also be able to testify about how the Government was notified of the impact statement and when the Government first chose to view the impact statement. The Defense also requests a witness who can testify as to when the Government approached the FBI about its general discovery obligations and a *Brady* search.
4. Department of Homeland Security (DHS). The Government notified the Court and the Defense on 8 June 2012 that the DHS had completed a damage assessment. *See* Appellate Exhibit 173, p. 16. The Defense requests a witness to be produced from DHS that can speak to how and when the Government learned of the DHS damage assessment. This witness should also be able to testify about when the Government first chose to view the damage assessment.
5. Office of the National Counterintelligence Executive (ONCIX). The Defense requests a witness from ONCIX who can testify to: i) the representation made to trial counsel in February 2012 regarding the ONCIX damage assessment; ii) the representation made to trial counsel in March 2012 regarding the ONCIX damage assessment; iii) what ONCIX had by way of a damage assessment in February and March 2012; iv) the contents of the 18 May meeting with ODNI; v) when the Government first contacted ONCIX and what information the Government knew and when.
6. DIA, DISA, CENTCOM, SOUTHCOM, CYERCOM. The Defense requests a witness from each of these agencies to testify as to when the Government first contacted these organizations and when the Government actually conducted an RCM 701(a)(2) and 701(a)(6)/*Brady* search.

7. DOJ. The Defense requests a witness from the DOJ who can testify as to when the Government first contacted the DOJ and when the Government actually conducted a 701(a)(6)/*Brady* search.
8. Government Agency. The Defense requests a witness from Government Agency who can testify as to when the Government first contacted Government Agency and when the Government actually conducted a 701(a)(6)/*Brady* search. The Defense also requests a witness who can testify as to when the Government learned of the existence of the second follow-on report by Government Agency.
9. 63 Agencies: On 23 February 2012, the Government represented at an 802 session and later during an Article 39(a) that it had been conducting a RCM 701(a)(6)/*Brady* search for approximately a year and that it found no RCM 701(a)(6)/*Brady* material. *See* Article 39(a) Audio Recording 23 February 2012, (unauthenticated record of trial at p. 39). The representation by the Government is inconsistent with their its later admission that it first became aware that ONCIX had received input from the 63 various agencies in February of 2012. *See* Appellate Exhibit 173, p. 16-20. The Government stated that it was only after February of 2012 that it began reaching out to the 63 different agencies. Based upon this admission, it appears that the Government did not begin its search for RCM 701(a)(6)/*Brady* material from the 63 agencies until February of 2012. Accordingly, the Defense requests at one witness from each of these agencies to testify about i) when the Government first contacted them regarding this case; ii) when the Government first became aware of existence of agency files; and iii) when the Government first examined the agency's files.

2. In addition to the above witnesses, the Defense requests that the Court order the Government to provide a copy of its due diligence filing based upon Appellate Exhibit CLXXVII. Although the Government's filing was *ex parte*, based upon the Article 10 motion, this filing should no longer remain *ex parte*. Under *United States v. Kossman*, 38 M.J. 258 (C.M.A. 1993) the test for measuring compliance with Article 10, UCMJ, is "reasonable diligence." *Id.* at 262 ("The touch stone ... is not constant motion, but reasonable diligence in bringing the charges to trial."). As a result of the Defense's Article 10 motion, the Government is required to provide an account of its activities. *See United States v. Laminman*, 41 M.J. 518 (C.G.Ct. Crim App. 1994)(court suggests that the best way for the military judge to proceed with an Article 10 motion would be to have the parties enter a stipulation of fact as to the undisputed portions of chronology and then to present evidence on those relevant matters upon which there is disagreement.). In this instance, the current *ex parte* filing by the Government should provide a basis for the required account. The Government will also need to account for its post-arraignment activity. In *United States v. Cooper*, 58 M.J. 54 (C.A.A.F. 2003), C.A.A.F. stated, "We therefore hold that the Article 10 duty imposed on the Government immediately to try an accused who is placed in pretrial confinement does not terminate simply because the accused is arraigned." The court went on to say that post-arraignment, the military judge has much more control of the course of the trial, but the "affirmative obligation of reasonable diligence upon the government does not change."

3. If the Government's current *ex parte* filing contains any information which could be considered work product or revealing part of the Government's trial strategy, the Defense would not object to this information being redacted with the Court's approval. Obtaining the Government's due diligence filing in advance of the Article 10 motion will allow the Defense and the Government to enter into a stipulation of fact as to the undisputed portions of chronology and then to present evidence on those relevant matters upon which there is disagreement. Narrowing the scope of the Article 10 issues will also likely result in the elimination of one or more of the above requested witnesses, and enable the Government and Defense to focus their witness lists on only the disputed portions of the chronology.

4. The Defense reserves the right to supplement this witness list should it be necessary to do so. If the Defense submits any additional request for witnesses, it will do so in a timely manner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. E. Coombs', written in a cursive style.

DAVID EDWARD COOMBS
Civilian Defense Counsel